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7
8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 ROBERT HEATH, and
12 CHERYL FILLEKES,
13 Plaintiffs, on behalf of themselves and
others similarly situated,

14 Plaintiffs,

15 v.

16 GOOGLE INC., a Delaware
corporation,

17 Defendant.

Case No. 15-cv-01824-BLF

18
19 **PLAINTIFF CHERYL FILLIKES'**
NOTICE OF MOTION AND
MOTION FOR CONDITIONAL
CERTIFICATION OF
COLLECTIVE ACTION
PURSUANT TO 29 U.S.C. § 216(b)

Date: November 10, 2016
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor,
San Jose

Complaint Filed: April 22, 2015
Trial Date: May 1, 2017

1 **PLAINTIFF CHERYL FILLEKES' NOTICE OF MOTION AND MOTION**
2 **FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION**
3 **PURSUANT TO 29 U.S.C. § 216(b)**

4 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

5 Please take notice that on November 10, 2016 at 9:00 a.m., in Courtroom 3, 5th
6 Floor of the above-titled court, located at 280 South 1st Street, San Jose, California
7 95113, Plaintiff Cheryl Fillekes ("Plaintiff") will, and hereby does, move this Court
8 pursuant to 29 U.S.C. § 216(b), to conditionally certify an opt-in Fair Labor Standards
9 Act collective action of certain applicants age 40 and older who allegedly were
10 discriminated against by Defendant Google, Inc. ("Google") in violation of the Age
11 Discrimination in Employment Act. Plaintiff provided notice to all parties of its intent
12 to file this Motion, and provided written notice to Google on June 28, 2016. Google
13 does not consent to Plaintiff's Motion for Conditional Certification. Pursuant to Local
14 Rule 7-1(b), Plaintiff requests that this motion be decided without oral argument.
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1 Dated: June 28, 2016

Respectfully submitted,

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1 **MEMORANDUM IN SUPPORT OF MOTION FOR CONDITIONAL**
2 **CERTIFICATION**

3 Plaintiff Cheryl Fillekes (“Plaintiff”), pursuant to 29 U.S.C. § 216(b), moves
4 the Court to conditionally certify an opt-in Fair Labor Standards Act (“FLSA”)
5 collective action of certain applicants age 40 and older who allegedly were
6 discriminated against by Defendant Google, Inc. (“Google”) in violation of the Age
7 Discrimination in Employment Act (“ADEA”). This case meets the lenient standard
8 for conditional certification as Plaintiff has shown through substantial allegations
9 and declarations that the proposed class members are “similarly situated” pursuant
10 to 29 U.S.C. § 216(b) and were affected by a common policy or plan.
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13 **I. PROPOSED CLASS**

14 Ms. Fillekes requests that the Court conditionally certify the following class:
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16 All individuals who interviewed in-person for any Software
17 Engineer (“SWE”), Site Reliability Engineer (“SRE”), or
18 Systems Engineer (“SysEng”) position with Google in the
19 United States during the time period from August 13, 2010
20 through the present; were age 40 or older at the time of the
interview; and were refused employment by Google.

21 The class is objectively defined in a way that allows class members to easily determine
22 whether they are part of the class. Ms. Fillekes was a candidate for each of the positions
23 in the proposed class. The proposed class includes only candidates who participated in
24 an in-person interview. Candidates for Google positions typically participate in a
25 phone-screening interview(s) before being invited to an in-person interview, and only
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27

1 a subset of candidates who are interviewed by phone are invited to an in-person
2 interview.¹ Limiting the class to candidates who participated in an in-person interview
3 helps ensure that only highly qualified candidates are included in the proposed class.
4 Further, the class is limited to the in-person interview stage of the hiring process, *i.e.*,
5 situations where Google interviewers could observe the approximate age or life stage
6 of the proposed class member.

7

9 **II. BACKGROUND**

10

11 Ms. Fillekes alleges that “Google has engaged in a systematic pattern and
12 practice of discriminating against individuals (including [Ms. Fillekes]) who are age
13 40 and older in hiring, compensation, and other employment decisions with the
14 resultant effect that persons age 40 or older are systemically excluded from positions
15 for which they are well-qualified.” Am. Compl. ¶ 52 (Dkt. #18). This pattern and
16 practice includes: “(a) knowingly and intentionally, in the company’s hiring and
17 employment practices, treating adversely individuals who are 40 years old and older,
18 and treating preferentially individuals who are under 40 years old, and (b) filling a
19 disproportionately large percentage of its workforce with individuals under 40 years
20 old (such that the median workforce age is 29 years old) even when there are many
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27 ¹ Approximately █% of all candidates considered for SWE positions are invited for an on-site interview at Google. GOOG-HEATH-00004596-97 at 4596 (Ex. 1).

1 individuals age 40 or older who are available and well-qualified for the positions at
2 issue.” *Id.* ¶ 55.
3

4 Hiring decisions at Google for SWE, SRE, and SysEng positions are made by
5 [REDACTED]. See GOOG-HEATH-00005454-5543 (Ex. 2); GOOG-
6 HEATH-00003452-54 at 3453 (Ex. 3). Candidates for these positions are often
7 [REDACTED]
8 [REDACTED]

9 [REDACTED]. See Ex. 1 at 4596; Ex. 3 at 3452-53.
10 Candidates who receive from interviewers [REDACTED]
11 [REDACTED]. See Ex. 3 at 3453. Not all
12 candidates, however, [REDACTED]
13 [REDACTED]. See, e.g., A.B. Decl. ¶14 (Jan. 28, 2016),
14 Fillekes 0008184-88 (Ex. 4); A.H. Decl. ¶¶ 7, 11, 14 (Jan. 17, 2016), Fillekes 0008189-
15 93 (Ex. 5). The [REDACTED]
16 [REDACTED], among other things, a candidate’s “Googleyness” to determine whether to
17 extend an offer to the candidate. *How We Hire*, Google, Inc.,
18 <https://www.google.com/intl/en/about/careers/lifeatgoogle/hiringprocess/> (last visited
19 June 28, 2016) (Ex. 6).

20 In comparison to the 29 year-old median age of Google’s workforce, the median
21 age in the United States for “computer programmers” is 42.8 years old, and for
22 “computer hardware engineers” is 41.7 years old. Am. Compl. ¶¶ 2, 5. On its website,
23

1 Google acknowledges that “We’re not where we want to be when it comes to
2 diversity.” *Id.* ¶ 6.
3

4 The EEOC has received multiple complaints of age discrimination by Google,
5 and is currently conducting an extensive investigation into Google’s employment
6 policies and practices. *Id.* ¶ 49; Google Answer ¶ 49 (Dkt. #21).
7

8 While Plaintiffs’ Complaint seeks recovery for age-related discrimination only
9 in hiring, Google pattern and practice of age discrimination also manifests itself in
10 discriminatory pay, promotions, performance reviews, and terminations. For instance,
11 in a prior lawsuit, *Reid v. Google, Inc.*, the California Supreme Court held that former
12 Google executive Brian Reid (formerly Google’s Director of Operations and Director
13 of Engineering) had presented sufficient evidence in alleging age discrimination to
14 warrant a trial and denial of summary judgment, including statistical evidence
15 supporting preferential performance reviews and bonuses for workers under 40 and
16 negative statements by high-level executives concerning older workers. Am. Compl.
17 ¶ 50. Mr. Reid presented evidence that executives and colleagues at Google had made
18 negative statements reflecting animus towards workers over the age of 40, including:
19 (a) that a supervisor had made age-related comments to Reid “every few weeks,”
20 including statements to Reid that his opinions and ideas were “obsolete,” and “too old
21 to matter;” (b) that other colleagues at Google had referred to Reid as an “old man,”
22 an “old guy,” and an “old fuddy-duddy,” and had told him his knowledge was ancient;
23
24

1 (c) that Reid alleged that in a performance evaluation he received, his supervisor stated
2 “Right or wrong, Google is simply different: Younger contributors, inexperienced first
3 line managers, and the super fast pace are just a few examples of the environment;”
4 (d) that Reid was told he was not a “cultural fit” as a reason for his job termination;
5 and (e) that a former Google recruiter testified that the term “cultural fit” was used in
6 company circles only to describe older workers. *Id.*; *Reid v. Google, Inc.*, 235 P.3d
7 988, 992, 993 (Cal. 2010). Google, and its employees, refer to older workers at Google
8 as “greylers.” See *Google Diversity*, Google, Inc.,
9 <https://www.google.com/diversity/at-google.html> (last visited June 27, 2016) (Ex. 7);
10 GOOG-HEATH-00000441-44 at 441 (Ex. 8).

11 Plaintiff Cheryl Fillekes’ personal experience reflects age discrimination by
12 Google. Ms. Fillekes started programming as a high school student in 1976, received
13 a B.A. in engineering at Cornell University in 1982, received a Ph.D. from the
14 University of Chicago in 1990 in computational geophysics, and served as a
15 Postdoctoral Fellow at Harvard University in 1993. Am. Compl. ¶ 32. She has
16 approximately 40 years of programming experience in a variety of programming
17 languages. *Id.* Between 2007 and 2014, Google interviewed her on separate occasions
18 for four different openings, including some occasions when Google affirmatively
19 reached out to her about the opening based on her impressive qualifications. *Id.* ¶¶ 4,
20 33-42. On each occasion, she performed well during her phone interviews and was
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1 invited to Google's offices for an in-person interview. *Id.* After each in-person
2 interview, and review by [REDACTED] on at least two occasions, Google
3 refused to hire Ms. Fillekes despite her highly-pertinent qualifications and
4 programming experience. *Id.*

5 In May 2010, Ms. Fillekes interviewed for a position as Software Engineer. A
6 Google recruiter told Ms. Fillekes that she needed to put her dates of graduation on
7 her resume "so the interviewers can see how old you are." Fillekes Depo. Tr. 152:3-
8 15 (Dec. 17, 2015) (Ex. 9); *accord* Heath-Fillekes 00005043-49 at 0005044 (Ex. 10);
9 Fillekes 0008221 (Ex. 11); Heath-Fillekes 0008181-83 at 8181 (Ex. 20). She
10 performed well at her in-person interview, but received a rejection the following week
11 stating that "[a]lthough you have an impressive background, there wasn't a strong
12 enough match to move forward at this time." Heath-Fillekes 00002118 (Ex. 12).

13 On another occasion, in 2014, Ms. Fillekes interviewed to be a Systems
14 Engineer. She received [REDACTED]. *See* GOOG-HEATH-
15 00000848-49 at 848 (Ex. 13). In considering her application, one Google employee
16 expressed: "[REDACTED] . ." GOOG-HEATH-
17 00001487-98 at 1487 (Ex. 14). A few days later, an internal e-mail about bringing Ms.
18 Fillekes for an on-site interview similarly expressed: "[REDACTED]"
19 [REDACTED] . ." Ex. 13 at 848.

Other highly qualified older applicants have had similar experiences, passing phone interviews and performing well at in-person interviews, but were rejected after the in-person interview allowed screeners to judge the age of the applicant. For example:

- J.W. has interviewed with Google five or six times, beginning when she was 41. J.W. Decl. ¶¶ 4, 6 (Dec. 23, 2015), Fillekes 0008204-07 (Ex. 15). Despite performing well at in-person interviews, she was not hired. One interviewer expressed concern about a cultural fit, noting that she might not be up for the “lifestyle.” *Id.* ¶ 10. Although J.W. assured him that she was willing to work long hours, the interviewer replied that he was still worried that she was “not Googley enough.” *Id.*
 - M.B. was recruited by Google, passed phone interviews, and performed well at an in-person interview in 2014. M.B. Decl. ¶¶ 4, 7-9 (Jan. 19, 2016), Fillekes 0008212-16 (Ex. 16). M.B., who was 60, was repeatedly questioned about how he would “fit into their culture” and handle “the fast pace at Google,” and the interviewers expressed skepticism. *Id.* ¶¶ 5, 9. M.B. was rejected by the hiring committee, and believes that he was rejected because of his age. *Id.* ¶¶ 11-12.
 - A.B. was considered for positions in 2014 and 2015. Ex. 4 ¶¶ 4-5, 9. Despite performing well in an in-person interview in 2015, and despite receiving a

1 glowing recommendation, A.B. was rejected, and he believes that he “was not
2 hired by Google because of my age.” *Id.* ¶¶ 13-16.
3

- 4 • A.H. has interviewed with Google three times after being contacted by a Google
5 recruiter, starting in 2002 or 2003, when he was 41 years old. Ex. 5 ¶¶ 4-6. After
6 an in-person interview in 2010 or 2011, he left “feeling that I had been treated
7 unfairly because of my age,” and believes that he was not hired “because of my
8 age.” *Id.* ¶¶ 14-15.
9
- 10 • A.M. interviewed with Google in 2011, when he was 51 years old, and all six
11 of his interviewers appeared to be in their twenties. A.M. Decl. ¶¶ 11, 12 (Jan.
12 17, 2016), Fillekes 0008194-98 (Ex. 17). He believes that he “was not hired by
13 Google because of my age,” and declined to pursue other opportunities at
14 Google because he believed that it would be futile to pursue those opportunities
15 because of his age. *Id.* ¶¶ 14-15.
16
- 17 • D.A. was recruited to interview with Google three times, likely based on his
18 [REDACTED] . D.A. Decl. ¶¶ 2, 4-5 (Jan. 19, 2016),
19 Fillekes 0008199 – Fillekes 0008203 (Ex. 18). In 2007, he was told he ranked
20 highest in one category on a technical phone interview. *Id.* ¶¶ 7, 10. He
21 performed well at the in-person interviews in 2007 and 2009, and was told by
22 one interviewer that the interviewer was surprised that D.A. was not hired. *Id.* ¶
23 7. D.A. believes that he “was not hired by Google because of my age.” *Id.* ¶ 15.
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- K.T. performed well at in-person interviews, but was rejected from employment at Google, and was told on one occasion that it was because he was not a good “fit” for the role. K.T. Decl. ¶¶ 8-11 (Jan. 27, 2016), Fillekes 0008208-11 (Ex. 19). K.T. believes that he “was not hired by Google because of my age.” *Id.* ¶ 12.

III. LEGAL STANDARDS

Collective actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly incorporates collective action enforcement provisions of the FLSA, 29 U.S.C. § 216(b). Under § 216(b), a collective action is appropriate if the proposed opt-in class of employees is “similarly situated”:

An action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other *employees similarly situated*. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

Courts take a two-step approach to determine whether plaintiffs are similarly situated. *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009). First, the court makes an initial, conditional “determination of whether plaintiffs are similarly situated, deciding whether a collective action should be certified for the purpose of sending notice of the action to potential class members.” *Id.* “The standard

1 for certification at this stage is a lenient one that typically results in certification.” *Id.*
2 (citing *Wynn v. Nat'l. Broad. Co.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002)).
3
4 The sole consequence of conditional certification is the sending of court-approved
5 written notice to potential class members. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.
6 Ct. 1036, 1043 (2016).
7

8 Plaintiff need only show “some identifiable factual or legal nexus [that] binds
9 together the various claims of the class members in a way that hearing the claims
10 together promotes judicial efficiency and comports with the broad remedial policies
11 underlying the FLSA.” *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D.
12 Cal. 2010). Plaintiff “must simply provide ‘substantial allegations, supported by
13 declarations or discovery.’” *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197,
14 1203 (N.D. Cal. 2013) (quoting *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D.
15 623, 627 (E.D. Cal. 2009)). “And, courts *need not even consider* evidence provided
16 by defendants at this stage.” *Id.* (citing *Kress*, 263 F.R.D. at 628). Because a motion
17 for conditional certification comes before discovery is complete and “is made in
18 anticipation of a later more searching review, a movant bears a *very light burden* in
19 substantiating the allegations at this stage.” *Prentice v. Fund for Pub. Interest*
20 *Research, Inc.*, No. C-06-7776SC, 2007 WL 2729187, at *2 (N.D. Cal. Sept. 18,
21 2007) (emphasis added).
22
23

24 “[C]ourts in this circuit overwhelmingly ‘refuse to depart from the notice stage
25

1 analysis prior to the close of discovery.”” *Ramirez*, 941 F. Supp. 2d at 1203 (quoting
2 *Kress*, 263 F.R.D. at 629).

3
4 The second determination in the two-step process is made after the close of
5 discovery, usually on a motion for decertification by the defendant, utilizing a stricter
6 standard for “similarly situated.” *Id.*
7

8 Notably, collective actions under the FLSA are not subject to the requirements
9 of Fed. R. Civ. P. 23, and the FLSA requirements are “considerably less stringent.”
10 *Hill*, 690 F. Supp. 2d at 1009; *see also Morden v. T-Mobile USA, Inc.*, No. C05-2112,
11 2006 WL 2620320, at *1-2 (W.D. Wash. Sept. 12, 2006) (rejecting argument that
12 class representative holding one employment position could not also bring collective
13 action on behalf of a second position because the Rule 23 typicality requirement did
14 not apply).
15

16 Numerous courts have granted conditional certifications for collective actions
17 alleging violations of the ADEA. *See, e.g., Hoffman-La Roche Inc. v. Sperling*, 493
18 U.S. 165, 169-73 (1989) (authorizing notice to ADEA class); *Thiessen v. Gen. Elec.*
19 *Capital Corp.*, 267 F.3d 1095, 1107-08 (10th Cir. 2001) (reversing de-certification
20 of ADEA collective action); *Pines v. State Farm Gen. Ins. Co.*, No. CV 89-631, 1992
21 WL 92398, at *4, 13 (C.D. Cal. Feb. 25, 1992) (certifying ADEA class in part based
22 on statistical evidence); *Williams v. Sprint / United Mgmt. Co.*, 222 F.R.D. 483, 487
23 (D. Kan. 2004) (finding differences in positions, managers, performance ratings, etc.
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1 between plaintiffs or class members “simply not relevant at the notice stage when
2 plaintiff ... has set forth substantial allegations that all plaintiffs were subjected to a
3 pattern or practice of age discrimination”).

5 Statistical evidence of an imbalanced workforce “is often a telltale sign of
6 purposeful discrimination,” and can be used to establish a prima facie case of
7 discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20
8 (1977); *see also Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1476 (9th Cir.
9 1995) (statistics relevant to proving pattern and practice of intentional age
10 discrimination); *Pagliolo v. Guidant Corp.*, No. 06-943, 2007 WL 2892400, at *3
11 (D. Minn. Sept. 28, 2007) (conditionally certifying ADEA class where “[f]acially,
12 plaintiffs have demonstrated a pattern based on their preliminary statistical
13 analysis”).

17 **IV. ARGUMENT**

19 **A. This Case Satisfies the Lenient First-Step Standard for Conditional Certification.**

20 Plaintiff has satisfied her “very light burden” of providing substantial
21 allegations, along with declarations or other discovery showing that class members
22 are “similarly situated” because she and the class members will rely on common
23 evidence to demonstrate that workers over 40 years old were similarly affected by a
24 pattern or practice of age discrimination. *Ramirez*, 941 F. Supp. 2d at 1203; *Prentice*,
25 2007 WL 2729187, at *2.

For example, Plaintiff has made detailed allegations of statistical evidence showing a pattern of age discrimination. Statistical analysis demonstrates that the median age of workers at Google is 29 years old, compared to an average age in the U.S. workforce of 42.8 for “computer programmers” and 41.7 for “computer hardware engineers.” Am. Compl. ¶¶ 2, 5, 5 n.1.² Statistical evidence also shows that workers under 40 received preferential performance reviews and bonuses. *Id.* ¶ 50. Such statistical evidence can provide *prima facie* evidence of a pattern or practice of age discrimination. *Int'l Bhd. of Teamsters*, 431 U.S. at 339 n.20; *Mangold*, 67 F.3d at 1476; *Pagliolo*, 2007 WL 2892400, at *3.

Plaintiff has also offered evidence of how Google's practice of intentional age discrimination was enacted. Google screens out older candidates like Ms. Fillekes at the in-person interview stage after observing and gaining other evidence of the applicant's age. Ms. Fillekes, for example, reached the in-person interview stage of the screening process on all four occasions when she was considered for a position,

² The complaint cites Bureau of Labor Statistics data for U.S. workforce statistics. Am. Compl. ¶ 5 n.1 (citing http://www.bls.gov/cps/occupation_age.htm). Google's median employee age of 29 years old is reflected in data from Pay Scale. See <http://www.payscale.com/data-packages/employee-loyalty/full-list> (reporting median age of Google employee at 29 years old); see also *Dark Side of Social Media: Age Discrimination*, CBS News, available at <http://www.cbsnews.com/news/dark-side-of-social-media-age-discrimination/> (“According to PayScale, which claims to have the world’s largest employee compensation database, the median age[] of employees at . . . Google [is] 31,” compared to HP and IBM, “both of which have a median employee age of 44.”).

1 but each time was denied employment despite performing well in the interviews. On
2 one of those occasions, a Google recruiter required Ms. Fillekes to put her dates of
3 graduation on her resume “so the interviewers can see how old you are.” Ex. 9 152:3-
4 15; *accord* Ex. 10 at 5044, Ex. 11; Ex. 20 at 8181 (Ex. 20). Although she performed
5 well at her in-person interview, and was told she had “an impressive background,”
6 she was rejected for not being a good “match.” Ex. 12 at 2118.

7 Plaintiff has further satisfied the requirements for conditional certification by
8 offering a variety of other detailed allegations, declarations, or discovery to support
9 her claim of a pattern or practice of age discrimination similarly affecting class
10 members. *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 468 (N.D. Cal. 2004)
11 (“courts usually rely only on the pleadings and [] affidavits,” and “[s]ome courts only
12 require that plaintiffs make ‘substantial allegations’ that the putative class members
13 were subject to a single illegal policy, plan or decision.”) For example, as described
14 in the Background section above, Ms. Fillekes offers the following allegations or
15 evidence:
16
17

- 18 • Google admitted in its answer that the EEOC has received complaints of age
19 discrimination by Google and is currently investigating Google. Google
20 Answer ¶ 49; *see also* Am. Compl. ¶ 49.
21
- 22 • As alleged in the complaint, and as reflected in evidence accepted as
23 admissible in other court proceedings, high-level Google executives and
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1 supervisors have made negative statements concerning older workers,
2 including negative statements to former Google executive Brian Reid by his
3 supervisor “every few weeks,” such as statements that his ideas were
4 “obsolete” and “too old to matter;” that Google colleagues referred to Reid as
5 an “old man,” an “old guy,” and an “old fuddy-duddy”; that Reid was told he
6 was terminated because of a lack of “cultural fit,” which is a term that a former
7 Google recruiter testified was used in company circles only to describe older
8 workers. *Id.* ¶ 50; *Reid*, 235 P.3d at 992, 993.

- 11 • The declaration of applicant J.W. that a Google interviewer expressed concern
12 that she might not be up for the “lifestyle” and might not be “Googley
13 enough.” Ex. 15 ¶ 10.
- 14 • Declarations from six applicants who believe that they were not hired by
15 Google because of their age. Ex. 4 ¶ 16; Ex. 5 ¶ 15; Ex. 16 ¶ 12; Ex. 17 ¶ 15;
16 Ex. 18 ¶ 15; Ex. 19 ¶ 12.
- 17 • As reflected [REDACTED] on Google’s own website,
18 Google sometimes refers to older works as “greyglers.” Ex. 7; Ex. 8 at 441.
- 19 • Plaintiff Cheryl Fillekes’ allegations and testimony reflect that, despite her
20 impressive credentials and experience, and after passing phone interviews
21 with high scores, Plaintiff Cheryl Fillekes was repeatedly rejected for
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1 positions at Google after interviewers met her in person and knew her
2 approximate age. Am. Compl. ¶¶ 4, 32-42; Ex. 9 12:23-13:6.
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- 4 • Discovery documents reflect that Google expressed concern about Ms.
5 Fillekes' age: “[redacted], [.]” Ex.
6 14 at 1487, “[redacted]
7 [redacted].” Ex. 13 at 848.

8 Plaintiff's statistical evidence, combined with the declarations and other
9 discovery evidence, are sufficient for plaintiff to meet her minimal burden of
10 establishing that conditional certification is appropriate. *Pines*, 1992 WL 92398, at *3-
11 4 (relying on statistics and other evidence of a practice of age discrimination);
12 *Pagliolo*, 2007 WL 2892400, at *3 (relying on affidavit, interrogatory answers, and
13 preliminary statistical analysis).

14 The fact that Plaintiff is seeking to certify three (3) different types of positions
15 – Software Engineer (“SWE”) positions, Site Reliability Engineer (“SRE”) positions,
16 and Systems Engineer (“SysEng”) positions – for discrimination in hiring and
17 employment is immaterial to the “similarly situated” analysis in this case, as they were
18 subjected to the same pattern or practice of age discrimination. *See, e.g., Tyson Foods*,
19 136 S. Ct. at 1045-50 (affirming verdict for plaintiffs in FLSA collective action
20 involving multiple jobs with varying amounts of time required for donning and doffing
21 protective gear); *Pagliolo*, 2007 WL 2892400, at *2 (granting conditional certification
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despite “different job duties, . . . [and] different supervisors, . . . ages and lengths of service”); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294, 298 (N.D. Cal. 1991) (notice appropriate in ADEA action even though class members “were employed at 112 different locations in 74 different jobs and left employment on 103 different dates” and defendants argued that decision-making was “highly decentralized”).

Similarly, any argument offered by Google attacking the merits of Plaintiff’s claims is premature, as “[t]he initial ‘notice stage’ is not the appropriate time for a court to evaluate the merits of plaintiffs’ . . . claims.” *Shaia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 272 (N.D. Cal. 2015); *see also Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 838 (N.D. Cal. 2010) (“The fact that a defendant submits competing declarations will not as a general rule preclude conditional certification.”).

In sum, Plaintiff has offered enough evidence of Google’s pattern and practice of age discrimination to meet the lenient standard for conditional certification.

B. Class Notice Should Be Authorized.

The only consequence of conditional certification is the sending of court-approved written notice to potential class members, who join the collective action only if they file written consent with the court. *Tyson Foods*, 136 S. Ct. at 1043. Court approval and facilitation of written notice serves the goals of “avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action.” *Hoffmann-La Roche*, 493 U.S. at 172.

1 Plaintiff has attached a proposed notice and consent form as Exhibit 21.
2 Plaintiff proposes a 90-day opt-in period, consistent with what other courts have
3 approved for large potential classes. *Woods v. Vector Mktg. Corp.*, No. C-14-0264,
4 2015 WL 1198593, at *4 (N.D. Cal. Mar. 16, 2015) (citing *Adams v. Inter-Con Sec.*
5 Sys., Inc.

6 242 F.R.D. 530, 542 (N.D. Cal. 2007)).
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8 Plaintiff proposes that notice be given as follows: notice will be delivered to all
9 potential class members by e-mail; an official case web page will be created where
10 potential collective action members can review the official notice and submit an opt-
11 in form; and depending on the number of undeliverable e-mails, Plaintiff will be
12 permitted, but not required, to send a follow-up postcard notice via U.S. mail to
13 potential class members whose email notice was returned as undeliverable, and the
14 postcard will direct them to the official case web page. Collective action members will
15 be permitted to submit opt-in claim forms on the official case web page using online
16 signatures, and may be permitted to submit claim forms via e-mail if they are incapable
17 of submitting their claim online.
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19 When, as here, “[t]he potential class members [are technology workers, they]
20 are likely to be particularly comfortable communicating by email and thus this form
21 of communication is just as, if not more, likely to effectuate notice than first class
22 mail.” *Lewis*, 669 F. Supp. 2d at 1128-29. Courts have often approved notice via e-
23 mail. *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524, 2013 WL 4552493, at *5 (N.D.
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1 Cal. Aug. 27, 2013) (approving notice by email as “the most appropriate method for
2 effectuating notice in this case”); *Guy v. Casal Inst. of Nev., LLC*, No. 2:13-cv-02263,
3 2014 WL 1899006, at *7 (D. Nev. May 12, 2014) (authorizing notice by email and/or
4 first class mail).

5 Courts have authorized the use of an official case website and submission of
6 online claim forms through the case website using electronic signatures. *Woods*, 2015
7 WL 1198593, at *4, 6.

8 Plaintiff requests that the Court approve the proposed notice and consent form.

9

10 **C. Google Should Be Ordered to Produce Names and Contact Information of**
11 **Potential Class Members.**

12 Google should be ordered to provide, within 15 days, the names and contact
13 information for potential class members, *i.e.*, every applicant who interviewed for any
14 SWE, SRE, or SysEng position and was, based on date of birth (if known) or college
15 graduation date, was 40 years of age or older at the time of application. *See Hoffmann-*
16 *La Roche*, 493 U.S. at 170 (“The District Court was correct to permit discovery of the
17 names and addresses of the discharged employees.”). This contact information should
18 be provided in electronic format in an excel spreadsheet, and should include: position
19 applied for; dates of employment interview(s) for SRE, SWE, or SysEng positions,
20 along with their: name, e-mail address, mailing address, telephone number, college
21 and (if applicable) graduate school graduation date(s), and date of birth (if known).

22 Courts have approved discovery of such information. *See, e.g., Lewis*, 669 F. Supp. 2d

1 at 1129-30.

2
3 **V. CONCLUSION**

4 For the foregoing reasons, Plaintiff respectfully requests that the Court
5 conditionally certify the proposed class, authorize notice, and require production of
6 the names and conduct information of potential class members.
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10 Dated: June 28, 2016

Respectfully submitted,

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